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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HARFORD COUNTY, MARYLAND,
Petitioner,

v.

CHESAPEAKE B & M, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a county ordinance provide for prompt judicial review in order to satisfy the free speech requirements of the First Amendment when the ordinance confers only ministerial discretion upon the licensor and is designed to protect the health, safety and welfare of its citizens by minimizing the undesirable secondary effects generally associated with an adult bookstore?

2. If the county ordinance must expressly provide for prompt judicial review, is that requirement satisfied if the ordinance affords a prompt exit from the administrative licensing system and an avenue of immediate appeal of that decision to the judiciary, or must the ordinance also provide for prompt completion of the judicial process in order to satisfy the procedural safeguards required under the First Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Harford County, Maryland (the "County") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit (App. 1a) is reported at 58 F.3d 1005. The opinion of the U.S. District Court for the District of Maryland (App. 38a) is reported at 831 F. Supp. 1241. The opinion of the district upon the Respondent's Motion to Amend the Judgment (App. 57a) is unreported.

JURISDICTION

The Fourth Circuit, sitting *en banc*, entered its judgment on July 5, 1995 (App. 1a). The jurisdiction of this

Court is invoked under 28 U.S.C. § 1254(1) (1988 & Supp. V 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the rights of the people to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The First Amendment is made applicable to the states through the Fourteenth Amendment.

Bill 92-27 as enacted by the County Council of Harford County, Maryland is set forth in full in the appendix to this Petition for Writ of Certiorari. (App. 62a.)

STATEMENT OF THE CASE

A. Factual Background.

On May 11, 1992, the Harford County Council enacted Bill 92-27 to protect the health, safety and welfare of its citizens by minimizing the undesirable secondary effects of adult bookstores whose business is to sell or to rent sexually explicit materials and to provide sexually oriented entertainment. (App. 2a, 20a, 42a-43a.) The purposes of the licensing, civil disability, design, zoning and penalty provisions of the ordinance are to minimize the unlawful sexual activity, the transmission of sexual diseases, and the more general crimes associated with adult bookstores and to reduce the adverse impact to property values and to the quality of life in their surrounding areas. (App. 2a, 20a-21a, 42a-43a.) The ordinance is a content-neutral "time, place and manner" regulation

which confers only ministerial discretion on the County (i.e., the licensor) to deny a license to a qualifying adult bookstore. (App. 18a-19a, 45a-46a.)

Respondent, Chesapeake B&M, Inc., t/a Highway Craft, Gift & Book Store ("Chesapeake B&M"), is one of the four adult bookstores which was in operation in the County when the ordinance became effective on July 10, 1992. (App. 4a-5a.) Chesapeake B&M never applied for a license pursuant to the ordinance and, pending the outcome of this case, the County has not applied the ordinance to Chesapeake B&M or to any other adult bookstore. (App. 5a, 40a.)

B. Procedural History Of This Case.

Chesapeake B&M did not apply for or obtain a license. Instead, Chesapeake B&M filed suit against the County in the U.S. District Court for the District of Maryland. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 (1988 & Supp. V 1993) and 1343 (1988), declaratory and injunctive relief were sought under 42 U.S.C. § 1983 (1988) and attorney's fees were sought pursuant to 42 U.S.C. § 1988 (1988 & Supp. IV 1992). The suit presented a broad facial challenge to the constitutionality of the ordinance, contending, among other things, that the ordinance imposed a prior restraint on protected speech without the requisite procedural safeguards.

Chesapeake B&M and the County filed cross motions for summary judgment. (App. 5a, 39a.) The district court generally upheld the ordinance. (App. 56a.) However, it found the licensing provisions were unconstitutional to the extent that they did not preclude the potential for indefinite delay and they did not expressly require a license to issue in the event an administrative agency requested or required to submit information to the licensor failed to do so within the time frames specified.

(App. 47a-48a.) An additional basis for the court's determination rested in the fact that the ordinance did not expressly require that the status quo of an applicant be maintained during the licensing review process. (App. 47a-48a.) Both of those shortcomings were corrected by an amendment to the ordinance. (App. 6a, 28a.)

Otherwise, the district court found that the ordinance did not fail to provide for prompt judicial review since it authorized an immediate appeal of the licensing agency's decision to the Maryland court with general jurisdiction to hear the appeal. (App. 51a.) It found that Chesapeake B&M did not have standing to challenge the inspection provisions and held that even if it did have standing, because a bookstore was a place of public accommodation, no Fourth Amendment expectation of privacy existed therefore the inspection provisions were constitutional. It ruled the disability provisions did not violate the constitutional prohibitions against *ex post facto* laws and bills of attainder. (App. 53a.) Finally, the district court held that the disability provisions did not violate the due process clause of the Fourteenth Amendment. (App. 53a.)

Chesapeake B&M filed a Motion to Alter or Amend Judgment which was denied. (App. 59a.)

Chesapeake B&M then noted a timely appeal to the U.S. Court of Appeals for the Fourth Circuit. Argument was held before a panel of the Fourth Circuit, and the panel voted to affirm. However, the panel withheld publication of an opinion in view of the potential conflict with *11126 Baltimore Boulevard, Inc. v. Prince George's County, Maryland,* 32 F.3d 109 (4th Cir. 1994), a reported decision by a different panel of the court. (App. 7a.) The area of conflict concerned the applicability and the meaning of the phrase "prompt judicial review" as a procedural safeguard in an adult entertainment licensing system.

The Fourth Circuit issued an order November 2, 1994 vacating both panel decisions and scheduling both cases for rehearing *en banc*. The November 2, 1994 order stated that "the court has particular interest in the issue common to both cases of what is required to meet the requirement that 'expeditious judicial review . . . must be available,' *see, FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, [227, 110 S.Ct. 596, 606, 107 L.Ed.2d 603] (1990), and whether the ordinances involved in these cases meet that requirement." (App. 61a.)

Supplemental briefs were filed and argument was held on March 7, 1995. On July 5, 1995, the Fourth Circuit issued an opinion reversing in part, remanding in part (for a determination of severability) and vacating in part [1] the decision of the district court by a vote of ten to four. The majority found that the ordinance was unconstitutional in its failure to provide prompt judicial review, concluding that "prompt judicial review means a sufficiently prompt decision on the merits." (App. 12a.)

The dissent, in an opinion authored by Judge Niemeyer, concluded: first, the ordinance does not confer unbridled discretion upon the licensing agency and thus does not embody an unconstitutional prior restraint that requires the procedural safeguard of prompt judicial review (App. 18a); second, even if the procedural safeguard of prompt judicial review is necessary, only prompt access to a court, not swift completion of the judicial process, is required; and third, in any event, the Maryland Rules of Procedure provide the means to obtain a prompt judicial decision. (App. 20a.)

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[1] The Fourth Circuit vacated the portion of the district court's judgment relating to the disability and the inspection provisions in the ordinance and found that Chesapeake B&M did not have standing to challenge those provisions.

REASONS FOR GRANTING THE WRIT

There is a clear and direct conflict among several circuits of the Court of Appeals on the question of how this Court's requirement of "prompt judicial review" in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), is to be interpreted and applied. This case presents a timely opportunity to provide needed guidance to the conflicting and splintered courts below. The ability of local communities to regulate the undesirable secondary effects of sexually oriented businesses without running afoul of the First Amendment hinges on the resolution of the issue. The issue is one of continuing and increasing concern nationwide. The fact that in the past two years, two circuits, the Fourth and Seventh, have chosen to address this question *en banc* and have reached adverse conclusions further illustrates the importance of and the confusion about the issue.[2] The Fourth Circuit's resolution of this important issue is erroneous and must be rectified.

I. THE FOURTH CIRCUIT'S INTERPRETATION OF "PROMPT JUDICIAL REVIEW" IS IN DIRECT CONFLICT WITH THAT OF THE FIRST, FIFTH AND SEVENTH CIRCUITS AND AGGRAVATES THE EXISTING CONFUSION ON THE QUESTION.

This Court, in examining an adult entertainment licensing scheme in *FW/PBS* stated, in a plurality opinion, that "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *FW/PBS*, 493 U.S. at 228. What constitutes "the possibility of prompt judicial review" and when it is required

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[2] The *en banc* process is "consumptive of the court's resources" and thus "the matter or the issues involved must be of some uncommon import, implicating important policy matters or issues of wide-reaching effect." Niemeyer, *Inner Workings of the United States Court of Appeals for the Fourth Circuit*, in APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL 61 (Paul M. Sandler & Andrew D. Levy eds., 1994).

has generated a great deal of uncertainty, controversy and confusion among the courts of appeals. Five circuits have addressed the question, two sitting *en banc*. Three circuits (the First, Fifth and Seventh) have held that the possibility of prompt judicial review means that prompt access to the judiciary must be available. Two circuits (the Sixth and now the Fourth) have found that a guaranteed prompt decision by the judiciary is required. The conflict involved is a direct, clear and specific one, not merely a conflict in principle or reasoning, and thus deserves and requires resolution by this Court.

In the case *sub judice*, the court below found that "prompt judicial review means a sufficiently prompt decision on the merits." (App. 12a.) The dissenting opinion, however, concluded that prompt access to the judicial system, not a guaranteed prompt judicial decision, was required and pointed out that "at least three other circuits share this view. *See Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (en banc); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993)." (App. 20a.)

Although the majority did not address this conflict in its opinion below, it did so in a footnote in its opinion in *11126 Baltimore Boulevard*, 58 F.3d 988 (4th Cir. 1995) (en banc), the companion case argued on the same day as the case *sub judice*. The court there acknowledged that the circuits are split on the question and that the Fifth Circuit in *TK's Video* and the First Circuit in *Jews for Jesus* have held that the requirement of prompt judicial review is satisfied by providing access to the courts after an administrative denial of a license. The court, although acknowledging the direct conflict, concluded that it found neither the First or Fifth Circuits persua-

sive on the question. *11126 Baltimore Boulevard,* 58 F.3d at 1000 n.17.

The Sixth Circuit addressed the question in *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (en banc), *cert. denied,* 114 S.Ct. 1837, 128 L.Ed.2d 464. The fact that the *Graff* case produced two concurring opinions as well as a dissenting opinion further indicates the degree of confusion to be found on the question of prompt judicial review. In *Graff,* the majority opinion found that the requirement of prompt judicial review was satisfied through prompt access to the judiciary available through the common law writ of *certiorari* in Illinois. *Graff,* 9 F.3d at 1325. Judge Flaum, in a concurring opinion, concluded that when the ordinance at issue contained express and well defined standards and did not present the licensing agency with an opportunity to make decisions of direct First Amendment concern, a special provision for judicial review was not necessary. Similarly, Judge Ripple, in a separate concurring opinion joined by two other judges, felt that the requirements of *FW/PBS* did not apply to a licensing scheme which did not vest unfettered discretion in the licensing agency and thus the procedural safeguard of prompt judicial review was not required.[3]

Conversely, and adding to the conflict among the circuits, the Sixth Circuit, in *East Brooks Books, Inc. v. City of Memphis,* 48 F.3d 220, 224 (6th Cir. 1995), recently held that a Memphis ordinance which provided judicial review of the licensor's decision by way of Tennessee's writ of *certiorari* process was unconstitutional for its failure to provide prompt judicial review.[4]

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[3] Judge Niemeyer, in the case *sub judice,* expresses essentially the same view in part II of his dissenting opinion.

[4] The Memphis ordinance, however, may be distinguished from both the Chicago and Harford County ordinances in that it vested considerably more discretion in the administrative decision-maker

There is a direct conflict among the circuits on the question of when the procedural safeguard of prompt judicial review is required and whether the requirement is satisfied by prompt access to, rather than by prompt decision by, the judiciary. The appellate courts are struggling with this question and can only look to this Court for its resolution. That they are in need of and are seeking this Court's guidance can be seen in the language of the courts in their opinions on this issue. The Fourth Circuit, in *11126 Baltimore Boulevard,* concluded, "The questions presented are difficult, and there is little authority to guide our decision." 58 F.3d at 1001. The Sixth Circuit commented, "Although the Supreme Court has not expressly defined prompt judicial review, we believe that potential delays of over five months are impermissible." *East Brooks Books,* 48 F.3d at 225. Likewise, the Eleventh Circuit noted, "The [Supreme] Court, however, has not clarified exactly what type of judicial review is sufficient to fulfill this requirement . . . ." *Redner v. Dean*, 29 F.3d 1495, 1501 (11th Cir. 1994). Finally, one of the concurring opinions in *Graff* left no doubt as to that circuit's desire for guidance from this Court, describing the question of prompt judicial review as "a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States" and later stating "there is a great need for clarification of standards in this area, and I respectfully suggest that this case is deserving of further review in the Supreme Court of the United States." *Graff*, 9 F.3d at 1333, 1335. The conflict and confusion has only increased since the *Graff* decision in 1993. Additional circuits have

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because one of the grounds for denying the license was if the applicant "has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." *East Brooks Books*, 48 F.3d at 223.

addressed the question and no consensus of opinion has emerged. Rather, there is clear disagreement both among the circuits and within the individual courts of appeals.

The conflict presented here is not simply a disagreement between two circuits. The concern is widespread, the question has been addressed by six circuits,[5] and a wide range of reasoning and result has been the outcome. The case *sub judice* provides this Court with the opportunity to address and resolve this thorny question.

II. THE QUESTION PRESENTED IS IMPORTANT.

The question presented here is important in several respects. It deals with a fundamental aspect of this country's jurisprudence, the First Amendment, and concerns an issue being addressed by local communities nationwide. Local communities have the right to protect themselves from the harmful secondary effects of sexually oriented businesses by appropriate and permissible regulation.[6] Unfortunately, the Fourth Circuit's decision requiring "prompt judicial review" of a licensing system that vests no discretion in the licensor and which can be satisfied only by a guaranteed prompt judicial decision leaves local governments powerless to fashion and enact any such ordinances.

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[5] The six circuits are the First, Fourth, Fifth, Sixth and Seventh Circuits as mentioned *infra* and the Eleventh Circuit in *Redner*, which addressed but somewhat skirted the issue by holding that the opportunity for indefinite delay in the administrative decision-making process constituted indefinite delay in accessing the judiciary or obtaining a judicial decision. *Redner*, 29 F.3d at 1502.

[6] This Court has a long tradition of placing decisions regarding sexually explicit material in the hands of the local community and has held that even the fundamental decision as to what material is obscene as opposed to that entitled to the protection of the First Amendment must be determined by reference to contemporary community standards. *Miller v. California*, 413 U.S. 15 (1973).

In Maryland and in most states, the power to license businesses and the power to zone has been conferred on local government. Likewise, local government has been granted the power to confer an appeal to the appropriate state courts of the licensing and zoning matters that are within its province. However, the courts are a separate and independent branch of the state, and the functioning of the courts remain within the sole and exclusive province of the state. Local government simply cannot dictate the time frames under which the state judiciary must act. The holding of the Fourth Circuit precludes local communities from protecting against the harmful secondary effects of sexually oriented businesses.

Further difficulty is engendered because of the disparity in the application of First Amendment principles among the circuits. Local communities in the First, Fifth and Seventh Circuits can regulate against the harmful secondary effects of sexually oriented businesses as long as the regulatory ordinances provide prompt access to the judiciary. Local communities in the Fourth and Sixth Circuits, and perhaps in the Eleventh Circuit, are for all practical purposes precluded from regulating against the harmful secondary effects.

There is no compelling reason to require prompt judicial review of a licensing system or a zoning system which is a content-neutral "time, place and manner" ordinance that does not confer the licensor or the zoning authority with unbridled discretion. In *Freedman v. Maryland*, 380 U.S. 51 (1965), which challenged a censorship statute that required the censor to render a decision based on content, this Court required a prompt decision by the censor and prompt judicial review of that decision. The plurality opinion in *FW/PBS*, which has not been construed with any clear consensus among the circuits, applied the *Freedman* prompt judicial review concepts to a licensing ordinance which vested the licensor with some degree of discretion because the ordinance did not expressly require a license to issue or to be denied within

a definite and prompt time limit. However, where such unfettered discretion is absent, this Court has recognized that the normal processes of judicial review are sufficient to ensure that a decision-maker has properly applied the review criteria clearly and explicitly delineated in the legislative system. *See*, e.g., *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American MiniTheaters, Inc.*, 427 U.S. 50 (1976). This Court needs to clarify whether an ordinance which is content-neutral, which merely confers ministerial discretion upon the licensor, and which protects health, safety and welfare by minimizing undesirable secondary effects is constitutional as long as it provides for a prompt exit from the administrative licensing system.

Moreover, this Court has completely reversed the economic incentives in place when *Freedman* was decided. Under *Monroe v. Pape*, 365 U.S. 167 (1961), a local government was not subject to suit for monetary damages for a policy that violated the constitutional rights of a sexually oriented business.[7] Thus, a local government could cripple a sexually oriented business through the application of a veiled censorship law without concern of exposure to a suit for monetary damages. This Court's decision in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), reversed *Monroe* and created a significant economic disincentive for a local government to attempt legislative censorship. This Court has expressly recognized the deterrent effect of its decision in *Monell*, noting:

> Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses,

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[7] While no case clearly prohibited a suit against a local official or employee for monetary damages for the infringement of a constitutional right, the law was not certain as to the breadth of recovery which could be obtained from a local official (*see*, e.g., *Moor v. County of Alameda*, 411 U.S. 693 (1973)), and the local official was generally entitled to qualified or to absolute immunity from suit.

> but to serve as a deterrent against future constitutional deprivations, as well. The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systematic" injuries that result not so much from the conduct of a single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. (Citations omitted.) (Footnote omitted.)

Owen v. City of Independence, Mo., 445 U.S. 622, 651-52 (1980).

A local government which applies an ordinance ultimately found to violate a person's First Amendment rights is subject to suit for monetary damages and for attorney's fees under 42 U.S.C. §§ 1983 (1988) and 1988 (1988 & Supp. IV 1992). Thus, unlike in the era of *Freedman*, a local government today has a substantial economic incentive to carefully tailor any ordinance which may affect a sexually oriented business so that it does not infringe on any of that business's First Amendment rights.[8]

It is unwise and contradicts traditional notions of separation of powers to require the judiciary to complete its decision making process within a legislatively mandated

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[8] Chesapeake B&M already has filed a petition for attorney's fees following the *en banc* decision of the Fourth Circuit in this case. *See, TK's Video*, 24 F.3d at 712 (awarding attorney's fees to sexually oriented businesses that brought a partially successful facial challenge to a local licensing ordinance).

time frame. In Maryland, the state constitution purports to require the Court of Appeals to issue a written opinion within three months after argument or submission of a case to the Court. Md. Code Ann., Const. Art. IV, § 15 (1981 Repl. Vol.). The Court of Appeals has long held that this "requirement" is directory only. *McCalls Ferry Power Co. v. Price*, 69 A. 832, 838 (1908). The individual nuances of a case can never be forecasted. The judiciary, which has the burden of making the decision, should have the opportunity to make a reasoned and well researched decision, rather than a hurried decision precipitated by an arbitrary deadline.

There are many conventional means by which a court can protect a sexually oriented business's First Amendment right to disseminate presumptively protected speech without imposing a defined time frame within which the judiciary must render a final decision. A court can protect the interests of an ongoing business through a grant of injunctive relief. A court can protect the interests of a prospective business through granting a writ of mandamus requiring the issuance of a license if a local government unlawfully frustrates a prospective business through its licensing or zoning system. Again, because the owner/operator of a sexually oriented business can obtain attorney's fees for any successful facial challenge to an ordinance and compensatory damages and attorney's fees for any monetary loss arising out of the unconstitutional application of an ordinance, a local government has a clear incentive to facilitate and to expedite the judicial process and to acquiesce to injunctive or mandamus relief.

The question of the meaning and application of "prompt judicial review" as a procedural safeguard implicates fundamental constitutional concerns and involves an issue with which local communities throughout the nation are struggling. The case *sub judice* presents this Court with the opportunity to provide needed direction on an issue of wide-reaching concern and significant import.

III. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

The Fourth Circuit held that the Harford County ordinance was unconstitutional because it failed to guarantee a prompt judicial decision of a denial of a license by the administrative agency. The Fourth Circuit based its decision on its analysis of this Court's holding in *FW/PBS*. In *FW/PBS*, this Court found the possibility of prompt judicial review of the licensor's decision to be necessary in the event that the license is erroneously denied. However, this Court identified the two "evils" it found intolerable in a licensing system regulating a First Amendment protected business as: 1) unbridled discretion in the hands of a government official; and 2) failure to place limits on the time within which the decisionmaker must issue the license. *FW/PBS*, 493 U.S. at 225-26.

Neither of these "evils" is present in this case. The ordinance places no substantive decisionmaking discretion in the hands of the licensor and the question of the time within which the licensor must make his decision was addressed by the district court and promptly remedied by the County through an amendment of its ordinance.[9] Because the amended ordinance does not confer unbridled discretion upon the licensor to deny a permit to a qualifying adult bookstore, the procedural safeguards prescribed

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[9] This Court, in *FW/PBS*, 493 U.S. at 226-27, cautioned that a licensing system that fails to place time limits on when a licensor must issue a decision confers a form of unbridled discretion which triggers the need for *Freedman* procedural safeguards. Because the original ordinance, while requiring issuance or denial within 44 days, did not expressly state that a licensing decision would have to be made within that time frame if one of the agencies having input into the licensing system did not timely submit the information required by the ordinance to the licensor, the district court found that there was an element of unbridled discretion left to the licensor. The amendment cured that deficiency and provided for the maintenance of the status quo during the licensing determination.

in *FW/PBS* are not constitutionally required. Thus, the Fourth Circuit erred in holding that the ordinance must provide for swift judicial completion of the review of the licensor's decision.

Additionally, even if it were to be assumed that the safeguards prescribed in *FW/PBS* are required, they are adequately met by the ordinance. *FW/PBS* requires the "possibility of" or an "avenue for" prompt judicial review.[10] This possibility or avenue is provided by the provision in the ordinance that allows a license applicant to appeal immediately a denial to the Circuit Court for Harford County. (App. 83a.) Only prompt access to, not prompt completion of, the judicial review process is mandated by *FW/PBS*. It would be inappropriate (as well as impossible) for the legislative branch of a local government to order the state judiciary to perform its function and to reach a reasoned decision within a predetermined deadline, particularly where federal constitutional questions are involved.

Finally, the Maryland Rules of Procedure provide ample mechanisms for completing the judicial review process expeditiously should the need arise. The Maryland Rules provide mechanisms by which any time frame may be shortened upon motion. Maryland Rules §§ 1-204, 7-204(c), 7-206(d), 7-207(c) and 7-208(b) (1995). Additionally, a party may apply for an *ex parte* or interlocutory injunction (Maryland Rules §§ BB70, *et seq.* (1995)) or for mandamus (Maryland Rules §§ BE40, *et seq.* (1995)).

Consequently, the Fourth Circuit erred in finding that the procedural safeguard of prompt judicial review prescribed in *FW/PBS* is applicable to a local ordinance that vests no discretion in the local licensing official. Even if it is presumed *arguendo* that prompt judicial review is

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[10] Nowhere is the phrase "prompt decision" used in Justice O'Connor's opinion in *FW/PBS*.

required, the Fourth Circuit erred in finding that prompt judicial review means a prompt judicial decision rather than simply prompt access to the judiciary. Finally, the court erred in not finding that the Maryland Rules of Procedure adequately provided mechanisms by which a prompt judicial decision could be obtained. This Court should grant the County's petition to correct the error of the court of appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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